(2)

Supreme Court, U.S.
FILED
AUG 25 2003
OFFICE OF THE CLERK

No. 03-87

In the Supreme Court of the United States

MICHAEL LYNCH,

Petitioner,

v.

TRENDWEST RESORTS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

DAVID L. GARRISON
Counsel of Record
GARRISON & ASSOCIATES PS
2001 SIXTH AVENUE
SUITE 3300
SEATTLE, WA 98121
(206) 441-3440

FLOYD L. NEWLAND
KARR TUTTLE CAMPBELL
1201 THIRD AVENUE
SUITE 2900
SEATTLE, WA 98101-3028
(206) 223-1313

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

7PP

NEW AUTHORITY SHOWING ADDITIONAL CONFLICT AMONG THE CIRCUITS

Petitioner brings to the Court's attention that *Andreas v. Volkswagen of America, Inc.*, Nos. 02-2309 & 02-2420, 2003 U.S. App. LEXIS 14562 (8th Cir. July 21, 2003), was decided after the filing of the Petition in this case. The *Andreas* court's reasoning and holding is in conflict with the holding of the Ninth Circuit in the instant case. *Andreas* follows the reasoning and decision of the Court in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940), the Fourth Circuit's decision in *Walker v. Forbes,* 28 F.3d 409 (4th Cir. 1994), and the Ninth Circuit's own case, *Cream Records Inc. v. Joseph Schlitz Brewing Co.*, 864 F.2d 668 (9th Cir. 1989). The *Andreas* case further highlights the Ninth Circuit's error in making an artificial distinction between "direct" and "indirect" sales not based on, nor justified by, 17 U.S.C. § 504(b).

The advertising at issue in the *Andreas* case utilized a phrase from plaintiff's copyrighted work entitled "Angels of Mercy." The advertising was used by defendant to promote Audi automobiles. The district court granted Audi's motion for judgment as a matter of law and vacated the jury's award of Audi's profits. The District Court held the circumstantial evidence of a causal connection between the evidence proffered by Andreas and Audi's profits was too speculative to support the jury's award. On appeal, Andreas argued that he had met his burden of proof.

The Eight Circuit reversed the district court's grant of Audi's motion for judgment:

> We recognize that it is difficult to establish the portion of profits attributable to an infringement in cases

> where the infringed material is used in an advertisement for another product, but Congress put the burden of establishing "elements of profit attributable to factors other than the copyright work" on the defendant. Further, **Congress did not distinguish between direct and indirect profits cases in allocating the burden of proof** between establishing *the fact* that an infringement contributed to a defendant's profits and *the extent* to which the infringement contributed to the profits. We hold that the jury's conclusion that Andreas established a nexus between Audi's infringing use of his copyrighted work and Audi's profits from the sales of the TT coupe is sufficiently supported by the evidence so as to defeat a motion for JAML.

Id. at *25-*26 (bold by counsel, italics in original). The court held the jury had sufficient circumstantial evidence to find that Audi's commercial "contributed to the profitable introduction of the TT coupe," which shifted the burden to Audi to show what effect other factors had on its profits. *Id.* at *19-*20. Andreas's evidence showed that the stolen phrase was the centerpiece of the commercial,[1] that Audi enthusiastically presented the commercial to its dealers as an important and integral part of its launch of the TT coupe, that sales of the

[1] The commercial depicted a TT coupe in a garden surrounded by angelic looking statues and contained a voice-over which says: "I think I just had a wake-up call, and it was disguised as a car, and it was screaming at me not to get too comfortable and fall asleep and miss my life." Andreas's copyrighted drawing, entitled "Angels of Mercy," was accompanied by the following text: "Most people don't know that there are angels whose only job is to make sure you don't get too comfortable & fall asleep & miss your life."

TT coupe during the period that the commercial aired were above Audi's projections, that the commercial received high ratings on consumer-recall surveys, and that Audi paid the advertising agency that created the commercial a substantial bonus based on the commercial's success. See *id.* at *18-*19.

Significantly, the court recognized that the infringing commercial probably did not contribute to every purchase of a TT coupe during the relevant time period, and that *some buyers may have never seen the commercial.* However, these considerations did not tip the scale in Audi's favor, as *"the detriment of any speculation"* should have been placed on Audi rather than on Andreas. *Id.* at *21 (emphasis added). The court said:

> [W]e reject the notion that Andreas was required to put a TT buyer on the stand to testify that she bought the car because of the commercial in order to meet his burden of a causal connection. Once a nexus was shown as established above, Andreas was required under the statute only to establish Audi's gross revenue from the TT coupe. Audi then bore the burden of establishing that its profit was attributable to factors other than the infringing words: the other two commercials that did not contain the infringed words, other parts of the Wake Up commercial, customer loyalty, brand recognition, etc.

Id. at *20. In the Lynch case, the question of whether or not the infringing video contributed to Respondent's timeshare sales should have been decided by the jury. Instead, the district court dismissed Petitioner's profits claim, and the Ninth Circuit affirmed, even though Petitioner's circumstantial evidence is far more convincing than those presented in *Andreas*.

Petitioner's copyrighted videos were developed and sold to customers as a visual aid for use in making timeshare sales. Respondent illegally copied and used over 100 scenes from at least five videos produced by Petitioner for his paying customers in its timeshare sales program in the exact same way that Petitioner's customers used such videos—in "podium" presentations to prospective buyers. In other words, Respondent stole a sales tool and used it as such in direct competition with Petitioner's paying customers.

The infringing video containing many scenes lifted straight out of Petitioner's copyrighted videos was used in each of Respondent's sales presentations over a period of at least five years, and Respondent made a business decision to continue its use after the commencement of litigation and through trial. During the relevant time period, approximately 1,000,000 potential buyers saw the infringing video as part of Respondent's sales presentations, and about 10% of them bought timeshare interests from Respondent. Buyers were given a copy of the infringing video to take home with them in order to reinforce their decision since each buyer had a period of time within which to rescind the purchase without penalty. According to Respondent, the purpose of a timeshare video is to capture "the beauty and essence of the resort experience" and to put the prospective buyer "in the picture." To that end, Petitioner's copyrighted images of Hawaii, Palm Springs, San Diego, Las Vegas and other scenic destinations were used by Respondent to induce potential customers to buy timeshare interests from Respondent. In particular, Respondent made extensive use of Petitioner's work in putting together the video sales presentation for its timeshare interests worldwide, including Hawaii, which generally is considered by the timeshare industry as the most desirable vacation spot in the world.

Not unlike the car commercial in *Andreas*, Respondent's infringing video was intended to accomplish one purpose—to sell timeshare interests—by captivating prospective buyers with enchanting images and, ultimately, by connecting them to the experience of ownership. If the infringing video was not an effective means of accomplishing that goal, one might ask why Respondent would bother showing it at all, let alone showing it continuously prior to and continuing through trial. One might also ask why every timeshare seller in the industry uses video presentations to help get buyers "in the mood."[2] The answer is simple. Commercials (which, in the Lynch case, were embodied in a video) sell. A multi-billion dollar industry is based on the idea that a picture is worth a thousand words.

Ninth Circuit's rejection of Petitioner's proof of causation by circumstantial evidence is unwarranted in this case. The court's decision is at odds with other circuit courts' interpretation of § 504(b) of the Copyright Act of 1976 and the clear intent of Congress with respect to that statute. For the reasons more particularly described in the Petition for Writ of Certiorari, Petitioner respectfully request that review be granted by this Court.

[2] For example, Respondent used Petitioner's copyrighted images of heavy traffic on a freeway and wild mustangs running freely on an open plain in its video presentations to highlight the sharp contrast between the daily grind of city life and the resort-like experience of timeshare vacations.

RESPECTFULLY SUBMITTED this 22nd day of August, 2003.

GARRISON & ASSOCIATES PS

David L. Garrison, WSBA #1844
Counsel of Record

KARR TUTTLE CAMPBELL

Floyd L. Newland, WSBA #1009

Attorneys for Petitioner Michael Lynch